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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 UNITED STATES OF AMERICA,) SA CV 08-219 AHS
12) SA CR 02-185 AHS
13 Plaintiff/Respondent,)
14 v.) ORDER DENYING PETITIONER'S
15) MOTION TO VACATE, SET ASIDE
16 DAVID FREDERICK THORNTON,) OR CORRECT SENTENCE UNDER 28
17) U.S.C. § 2255
18 Defendant/Petitioner.)
19 _____)
20

21 I.

22 PROCEDURAL BACKGROUND

23 On June 28, 2002, a federal grand jury returned a 33-
24 count indictment charging David Frederick Thornton ("defendant"
25 or "petitioner") with mail fraud in violation of 18 U.S.C. § 1341
26 (ten counts), wire fraud in violation of 18 U.S.C. § 1343
27 (nineteen counts), and impersonation of a federal officer or
28 employee in violation of 18 U.S.C. § 912 (four counts). On March
17, 2003, pursuant to a written plea agreement, defendant pleaded
guilty to two counts of mail fraud, two counts of wire fraud, and
one count of impersonating a federal officer. On June 16, 2003,
the court sentenced defendant to ninety-six months imprisonment,

1 three years supervised release, \$644,388.25 in restitution, and a
2 \$500 mandatory special assessment.

3 As a result of defendant's first appeal, the Court of
4 Appeals for the Ninth Circuit, on April 10, 2006, remanded
5 defendant's case for limited proceedings in accordance with
6 United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en
7 banc), United States v. Thornton, 176 Fed. Appx. 765 (9th Cir.
8 2006). On October 16, 2006, the Court determined that re-
9 sentencing was not required. Defendant again appealed. On
10 January 10, 2008, in a published opinion, United States v.
11 Thornton, 511 F.3d 1221 (9th Cir. 2008), the Ninth Circuit
12 affirmed defendant's sentence.

13 Defendant's motion under 28 U.S.C. § 2255 (the "2255
14 Motion") raises multiple claims that his counsel, Deputy Federal
15 Public Defender Leon Peterson ("Peterson" or "defense counsel")
16 performed below constitutional standards in handling defendant's
17 case. For the reasons discussed below, defendant does not
18 establish ineffective assistance of counsel as set forth in
19 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.
20 Ed. 2d 674 (1984), because defendant does not show that his
21 counsel's conduct was deficient or that defendant was prejudiced
22 by any deficiencies in legal representation.

23 II.

24 OFFENSE CONDUCT

25 Because the parties are familiar with the facts, the
26 Court sets forth the overview contained in the Ninth Circuit's
27 opinion in United States v. Thornton, 511 F.3d 1221, 1224 (9th
28 Cir. 2008).

1 Over the course of many years, defendant successfully
2 defrauded friends, family members, and complete strangers out of
3 hundreds of thousands of dollars. He used two schemes: the
4 first involved a charitable foundation he established purportedly
5 to raise funds for kidney research for the University of Southern
6 California ("USC"). In return for the funds raised, USC paid
7 Thornton a salary and covered the administrative costs of the
8 fund-raising. Although Thornton turned over to USC some of the
9 funds raised, he kept about \$150,000 for his own purposes. He
10 also charged more than \$25,000 to credit cards taken out on
11 behalf of his foundation and USC, although USC never authorized
12 any joint credit cards. For about a year after USC terminated
13 its relationship with Thornton and his foundation, Thornton
14 continued fraudulently to solicit funds.

15 In the second scheme, Thornton purported to be working
16 for the United States government on various top secret missions,
17 mostly involving channeling Nigerian money into the United
18 States. Thornton explained to his victims that these
19 transactions required heavy financing but would result in huge
20 returns. Many friends and family members believed the tale, and
21 Thornton bilked them out of hundreds of thousands of dollars. He
22 also unsuccessfully attempted to cash a counterfeit check for \$25
23 million, purportedly from the Nigerian government.¹

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26 ¹ Further description of the offense conduct, as later
27 referred to herein, is derived from the facts reported in the
28 Pre-Sentence Report ("PSR") to which defendant made no objection
and which facts the Court adopted as its findings of fact at
defendant's sentencing hearing.

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III.SUMMARY OF PARTIES' CONTENTIONS

A. Petitioner's Grounds for Relief

Claim One: Defense counsel failed to contact and/or interview witnesses that defendant named as persons who could confirm his innocence.

Claims Two and Three: Defense counsel failed to investigate and raise defendant's claim that a "key prosecution witness unlawfully obtained [defendant's] private documents and records" and thereafter allowed government agents to review those documents without a search warrant.

Claim Four: Defense counsel refused to prepare for trial and insisted that defendant plead guilty because counsel was too "overwhelmed." Counsel also contacted defendant's wife and mother without defendant's permission and told them that defendant faced "22" years in prison if he refused a plea agreement.

Claim Five: Defense counsel stated he was "too busy" to convey defendant's offer to cooperate with the government in exchange for sentencing leniency.

Claim Six: Defense counsel instructed defendant to "lie under oath" about defendant's purported innocence when pleading guilty.

Claim Seven: Defense counsel refused to forward letters written by defendant and his wife, mother, and father to the U.S. Probation Office and Court in connection with sentencing.

Claim Eight: Defense counsel refused to investigate

1 the claim that defendant was a victim of entrapment due to his
2 years of involvement with the "Republican Party, government
3 politics, personal relationships and commendations from President
4 Reagan, President George H. W. Bush, Vice President Quayle,
5 Governor Wilson, and other leaders," along with defendant's
6 ongoing communications with the U. S. Government.

7 Claim Nine: It was error for defense counsel not to
8 object to the presence of 35 victims at the sentencing hearing.

9 Claim Ten: Defense counsel was ineffective by failing
10 to object at sentencing to the imposition of the abuse of trust
11 enhancement, imposition of conditions of release requiring drug
12 treatment and psychological counseling, and the order to make
13 monthly restitution payments of \$1,000.

14 Claim Eleven: Defense counsel failed to object to the
15 sentencing enhancement for carrying a weapon in connection with
16 the offense and failed to investigate defendant's claim that he
17 had a permit to carry such a weapon.

18 Claim Twelve: Defense counsel erred by failing to
19 object to the Court's imposition of a 16-level increase for
20 amount of loss at sentencing.

21 Claim Thirteen: The government unlawfully informed
22 third parties when it would execute arrest and search warrants
23 concerning defendant and/or his property, but Peterson failed to
24 act on such information.

25 Claim Fourteen: Defense counsel failed to obtain or
26 use certain purported exculpatory documents, namely, the Thornton
27 Foundation Bylaws and a contract with USC.

28 Claim Fifteen: Defense counsel failed to obtain

1 medical records or argue for a downward departure based on
2 defendant's medical condition.

3 **B. Respondent's Opposition**

4 Defendant's motion should be denied in all respects.
5 Defendant was not denied effective assistance of counsel, and the
6 Declaration of defense counsel who represented defendant so
7 indicates. The evidence attached to the Declaration of Curtis
8 Kin, Assistant United States Attorney, comprised of discovery and
9 plea agreement correspondence exchanged with Peterson, the final
10 plea agreement pursuant to which defendant entered his guilty
11 pleas, reporter's transcripts of defendant's change of plea and
12 sentencing hearings, the defendant's Sentencing Position and
13 letters submitted in support of defendant, and the Court's
14 Tentative Ruling issued at the sentencing hearing, support the
15 government's position that defendant is not entitled to relief.
16 Claim by claim, the government refutes petitioner's contentions
17 as follows.

18 **1. Failure to interview witnesses (Claim #1)**

19 Defendant asserts that Peterson failed to interview
20 witnesses that defendant named as persons who could confirm his
21 innocence. However, it is not clear that defendant ever provided
22 Peterson with a list of persons to interview. (Peterson Decl. ¶
23 33). Peterson did instruct his defense investigator to contact a
24 number of witnesses, including some of whom may have been
25 identified by defendant as persons to interview. (Peterson Decl.
26 ¶ 33). The investigator made contact with a number of witnesses,
27 including: (1) Dr. E.U. Kalu, Director of the Central Bank of
28 Nigeria, who could not verify or provide any definitive answers

1 about the existence of any contracts with Thornton for millions
2 of dollars; (2) Dr. Joseph Sansu (or Sansusi) of Nigeria; (3)
3 Steven Hurd, the bodyguard defendant had hired; (4) Dr. J.
4 Hapleman of the USC Medical Department; (5) B. Ott, whom
5 defendant claimed was his investment advisor; (6) M. Silk, who
6 was defendant's former business partner and friend; and (7)
7 defendant's wife and mother. (Peterson Decl. ¶ 33).

8 After November 1, 2002, when defendant first indicated
9 he wanted to plead guilty, the focus of Peterson's representation
10 shifted to negotiating the best plea agreement possible and
11 investigating the case insofar as it would relate to defendant's
12 guilty plea and sentencing, as opposed to trial preparation.
13 (Peterson Decl. ¶ 33). Peterson's representation necessarily
14 changed from interviewing witnesses that would demonstrate
15 innocence. Instead, Peterson's changed his approach to develop
16 evidence in mitigation, including, for example, an emphasis on
17 making arrangements for a psychological examination. (Peterson
18 Decl. ¶ 9).

19 **2. Failure to investigate and object to government's**
20 **receipt of documents by a third party without a**
21 **search warrant (Claims #2 & #3)**

22 Defendant claims that Peterson failed to investigate
23 and raise defendant's claim that a "key prosecution witness
24 unlawfully obtained [defendant's] private documents and records"
25 and thereafter allowed government agents to review those
26 documents without a search warrant. It is not clear that
27 defendant, in fact, ever raised this issue with Peterson.
28 (Peterson Decl. ¶ 34). This ground for relief lacks merit.

1 **3. Failure to prepare for trial because too**
2 **"overwhelmed" (Claim #4)**

3 The record shows that, in his plea agreement,
4 defendant: (1) admitted that he was "in fact guilty" of the
5 offenses to which he pled guilty; (2) agreed to a lengthy
6 statement of facts outlining in detail his charity fraud scheme,
7 his Nigerian fraud scheme, and his false impersonation of
8 government officers; and (3) signed his name under the
9 attestation that he understood the entire agreement and agreed to
10 all of its terms. (Kin Decl. Ex. E at ¶¶ 6, 15, 30 & Attach. A).

11 At the change of plea hearing, defendant confirmed
12 under oath that he wanted to plead guilty and was guilty. (Kin
13 Decl. Ex. F at 4, 12, 13). Defendant also confirmed under oath
14 that he agreed to the statement of facts attached to the plea
15 agreement, which established his guilt, and did not wish to make
16 any changes. (Kin Decl. Ex. F at 16-17). When asked explicitly
17 by the Court whether he wished to give up his rights to persist
18 in pleas of not guilty and go to trial, defendant answered, under
19 oath, in the affirmative.² Kin Decl. Ex. F at 21 22).

20 Consistent with defendant's actions and statements that
21 he, in fact, was guilty and wanted to plead guilty is the
22 recollection of his counsel. Peterson has no recollection of
23 defendant ever pleading with him to go to trial. (Peterson Decl.
24 ¶ 35). Rather, on numerous occasions prior to signing the plea
25 agreement, defendant told Peterson that he wanted to plead

26
27 ² In making these statements to the Court under oath,
28 defendant acknowledged that a false answer would subject him to
criminal penalties. (Kin Decl. Ex. F at 4-5).

1 guilty, including meetings on November 1, 2002; December 17,
2 2002; December 19, 2002; February 6, 2003; and February 28, 2003.
3 (Peterson Decl. ¶¶ 8, 12, 15, 18, 22). On March 7, 2003,
4 defendant ultimately signed the agreement after Peterson reviewed
5 all of the terms of the agreement and discussed the risks and
6 potential consequences of rejecting the proposed agreement.
7 (Peterson Decl. ¶ 25). After signing the plea agreement,
8 Peterson met with defendant in advance of the guilty plea
9 hearing, and defendant verified that he wished to go forward with
10 his guilty plea. (Peterson Decl. ¶ 27). If defendant had
11 indicated he no longer wanted to plead guilty, Peterson,
12 consistent with his normal practice, would have instructed his
13 client not to go forward. (Peterson Decl. ¶ 27). But, defendant
14 gave no indication of any problems, hesitations, or doubts about
15 the decision to plead guilty, other than the ordinary unhappiness
16 attendant with the realization that he must plead guilty to
17 having committed crimes.³ (Peterson Decl. ¶ 27).

18 Because the record clearly shows that defendant sought
19 to plead guilty, it is hardly surprising that the record does not
20 support the claim indeed -- bears no indication -- that Peterson
21 "insisted" defendant plead guilty or told defendant that he was
22 too "overwhelmed" to prepare for trial. Peterson denies having
23

24 ³ While it is true that, prior to signing the plea
25 agreement, defendant indicated on three occasions that he did not
26 wish to plead guilty or at least wanted a new lawyer, he recanted
27 almost immediately thereafter and confirmed that he did want to
28 plead guilty. (Peterson Decl. ¶¶ 10-11, 14-15, 17-18). Notably,
even when expressing some hesitance about pleading guilty,
defendant never went so far as to indicate any desire to go to
trial.

1 done so. (Peterson Decl. ¶ 35). Furthermore, Peterson's so
2 doing would have been entirely inconsistent with his ordinary
3 practice of proceeding to trial if a client wants to go trial.
4 (Peterson Decl. ¶ 35). Moreover, the allegation that Peterson
5 claimed he was too "overwhelmed" to prepare for trial is entirely
6 inconsistent with the fact that Peterson spent numerous hours and
7 days working on defendant's case, as set forth in Peterson's
8 Declaration and his case management notes. Thus, to the extent
9 Peterson "insisted" that defendant should plead guilty, such
10 insistence did not arise from Peterson's desire to avoid
11 preparing for trial; rather, it was borne of Peterson's
12 assessment that it was in defendant's best interest to accept the
13 government's plea offer, particularly in light of Peterson's
14 review of the case, the overwhelming evidence against defendant,
15 and the risks and downside of proceeding to trial. (Peterson
16 Decl. ¶ 35). Among other reasons, Peterson came to that
17 conclusion because defendant had made post-arrest statements
18 sufficient to support findings of guilt to all charges in the
19 indictment and because a conviction after trial might have led
20 to a Sentencing Guidelines range of 292-365 months imprisonment,
21 as opposed to the Guidelines range of 70-87 months contemplated
22 by the government's plea offer. (Peterson Decl. ¶ 35).

23 Accordingly, when viewed against the record, including
24 defendant's statements under oath at the plea hearing, it is
25 clear that defendant's unsubstantiated claims that his counsel
26 refused to prepare for trial and insisted defendant plead guilty
27 are so palpably incredible, patently frivolous, and false that
28 they must be dismissed. Blackledge v. Allison, 431 U.S. 63, 76,

1 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); Baumann v. United
 2 States, 692 F.2d 565, 571 (9th Cir. 1982). Moreover, based on
 3 the overwhelming evidence against defendant (including his
 4 written confession), it was highly reasonable -- and certainly
 5 not constitutionally defective -- for Peterson to have strongly
 6 advised defendant to plead guilty. Strickland, 466 U.S. at 689.

7 **4. Failure to convey to government the defendant's**
 8 **desire to cooperate (Claim #5)**

9 Defendant alleges that Peterson stated he was "too
 10 busy" to convey defendant's offer to cooperate with the
 11 government in exchange for sentencing leniency. Even if true,
 12 defendant's claim must fail, because no prejudice resulted from
 13 the purported failure of Peterson to communicate defendant's
 14 willingness to cooperate.⁴ On the heels of his arrest, defendant
 15 communicated in a written statement his willingness to cooperate
 16 with the government (Kin Decl. ¶ 4 & Ex. C), and, thus, the
 17 government was well aware of defendant's stated desire to assist
 18 law enforcement, regardless of whether Peterson passed along
 19 defendant's wish to cooperate.

20 In any event, whether defendant, Peterson, or both had
 21 lobbied the government for sentencing leniency in exchange for
 22 defendant's cooperation, the government was not ultimately
 23 interested in defendant's cooperation, because the government had
 24 concluded that defendant could not provide any substantial
 25 cooperation or assistance based on its review of documents seized

26 ⁴ Peterson declares that he would never tell a client that
 27 he was "too busy" to pursue cooperation with the government, and
 28 did not do so with respect to defendant in particular. (Peterson
 Decl. ¶ 36).

1 during the execution of the search warrant at defendant's home.
 2 The government's conclusion was in accord with Peterson's own
 3 conclusion that defendant did not have sufficient information
 4 about other Nigerian perpetrators of fraud such that the
 5 government would be interested in hearing about his information
 6 or that defendant's providing such information would have risen
 7 to the level of substantial assistance worthy of a downward
 8 departure for cooperation under Sentencing Guidelines Section
 9 5K1.1.⁵ (Peterson Decl. ¶ 36).

10 Accordingly, defendant's claim should be dismissed,
 11 because, even if true, defendant suffered no prejudice.

12 Strickland, 466 U.S. at 694.

13 **5. Instructing defendant to lie about defendant's**
 14 **innocence at the guilty plea hearing (Claim #6)**

15 Defendant says that Peterson instructed defendant to
 16 "lie under oath" about defendant's purported innocence when
 17 pleading guilty. As with defendant's claim that Peterson
 18 insisted defendant plead guilty despite defendant's innocence,
 19 previously discussed, the record clearly establishes the
 20 incredulity of defendant's claim here. To begin with, Peterson
 21 flatly denies having instructed defendant to lie and maintains
 22 that he would never give such an instruction to any client.
 23 (Peterson Decl. ¶¶ 27, 37). Indeed, Peterson states that,
 24 consistent with his normal practices, he met with defendant prior
 25 to the guilty plea hearing and explicitly instructed defendant to

26 ⁵ Indeed, it is Peterson's usual practice to encourage
 27 cooperation with the government if doing so would benefit his
 28 client, which, in Peterson's view, was not the case here.
 (Peterson Decl. ¶ 36).

1 tell the truth. (Peterson Decl. ¶¶ 27, 37).

2 Consistent with Peterson's statement, the record
3 unequivocally shows that defendant pled guilty because he was
4 guilty. Defendant confessed orally and in writing upon his
5 arrest. (Kin Decl. Ex. C). As part of his plea agreement,
6 defendant agreed to a statement of facts that was entirely
7 consistent with defendant's initial confessions. (Compare Kin
8 Decl. Ex. C with Ex. E at Attachment A). At the change of
9 plea hearing, defendant acknowledged his understanding that his
10 answers to the Court were under oath and subject to prosecution
11 for perjury if false. (Kin Decl. Ex. F at 4-5). While under
12 oath, defendant consistently and steadfastly maintained his
13 desire to plead guilty, as well his belief that he was, in fact,
14 guilty. (Kin Decl. Ex. F at 4, 12, 13, 16-17). Indeed, when
15 asked directly by the Court, defendant confirmed that his guilty
16 pleas were made freely and voluntarily and that there was no
17 reason whatsoever why the Court should not accept his guilty
18 pleas. (Kin Decl. Ex. F at 29 30). Having had the chance to
19 observe defendant and consider the circumstances, the Court also
20 concluded that "he's chosen to make these guilty pleas
21 intelligently [and] that he entered the guilty pleas because he
22 actually committed these crimes and not for any other reason."
23 (Kin Decl. Ex. F at 32-33).

24 Thus, in view of the entire record, defendant's
25 unsubstantiated claim that Peterson instructed him to lie
26 under oath in order to plead guilty despite defendant's innocence
27 is so palpably incredible, patently frivolous, and false that it
28 too must be dismissed. Blackledge, 431 U.S. at 76; Baumann, 692

1 F.2d at 571.

2 **6. Failure to forward letters at sentencing (Claim**
3 **#7)**

4 Defendant alleges that Peterson refused to forward
5 letters written by himself and his wife, mother, and father to
6 the U.S. Probation Office and the Court in connection with
7 sentencing. Peterson, however, did forward a letter from
8 defendant's wife along with his sentencing position paper.
9 (Peterson Decl. ¶ 38). Moreover, along with that letter,
10 Peterson sent to the Court and Probation Office numerous other
11 letters from friends and family members who wrote on defendant's
12 behalf. (Peterson Decl. ¶ 29; Kin Decl. Ex. G).

13 Whether there were, in fact, letters written by
14 defendant's mother and father is unclear (Peterson Decl. ¶ 38),
15 but it is clear that any such letters would not have altered the
16 outcome. At sentencing, the Court indicated that it had read and
17 considered all the various letters submitted by both defendant's
18 supporters and detractors. (Kin Decl. Ex. I at 4) ("[T]hese
19 lengthy letters have been reviewed by the court one by one so
20 that we are well aware of many of the positions of the family
21 members."). Moreover, the Court explicitly acknowledged at
22 sentencing its understanding that defendant's parents continued
23 to support him and even considered that support a mitigating
24 circumstance. (Kin Decl. Ex. I at 17) ("The probation officer
25 points out a factor in mitigation with is the support defendant
26 continues to receive from parents and his wife.").

27 Nonetheless, well aware of the continuing support from
28 defendant's parents and wife, the Court imposed a substantial

1 ninety-six month sentence, finding that "the long-term, more than
2 misconduct, betrayal and lies and criminal conduct over the
3 years" justified the sentence. Any additional letters from
4 defendant's parents and wife outlining their support for
5 defendant of which the Court was already well aware would not
6 have affected the outcome. Accordingly, this claim must also be
7 rejected. Strickland, 466 U.S. at 694.

8 **7. Failure to assert entrapment defense (Claim #8)**

9 Defendant claims that Peterson refused to investigate
10 the claim that defendant was a victim of entrapment. It is not
11 clear that defendant urged Peterson to investigate his purported
12 entrapment defense. (Peterson Decl. ¶ 39). In any event,
13 Peterson rightly refused to pursue any entrapment defense, as
14 there was no government involvement with defendant's conduct
15 forming the basis of the criminal charges. (Peterson Decl. ¶
16 39). Notably, there was no allegation or suggestion that the
17 government was involved in defendant's fraudulent solicitation of
18 donors for his foundation, his applying for and using credit
19 cards without authorization from USC, his lies to friends and
20 family about fake Nigerian business deals in order to obtain
21 their money, his attempt to cash a \$25 million counterfeit check,
22 or his attempt to procure multiple luxury automobiles by
23 pretending to work for the government. United States v. Glassel,
24 488 F.2d 143, 146 n.2 (9th Cir. 1973) (noting that "[i]n fact,
25 entrapment cannot be a defense unless there is government
26 participation or 'intervention'").

27 Accordingly, any failure to pursue an entrapment
28 defense was entirely reasonable and in no way constituted

1 ineffective representation; certainly, no prejudice resulted from
 2 the absence of raising a defense having no applicability to the
 3 case. Strickland, 466 U.S. at 687-88, 694.

4 **8. Failure to object to presence of victims at**
 5 **sentencing hearing (Claim #9)**

6 Defendant ascribes error to Peterson's failure to
 7 object to the presence of thirty five victims at the sentencing
 8 hearing. While the decision not to object is true,⁶ the claim
 9 that it is error is not. As Peterson well recognized,
 10 defendant's victims had a right to be present at his sentencing
 11 and any objection by Peterson to that effect would have been
 12 contrary to law. (Peterson Decl. ¶ 40); Kenna v. U.S. Dist. Ct.,
 13 435 F.3d 1011, 1015 (9th Cir. 2006) (noting that district court
 14 proceedings, including sentencing hearings, are public
 15 proceedings). Accordingly, Peterson committed no error when he
 16 did not object to the presence of thirty five victims exercising
 17 their right to attend defendant's public sentencing hearing. He
 18 was thus not constitutionally ineffective when he reasonably
 19 chose not to make that objection. Strickland, 466 U.S. at 688.

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23 **9. Failure to object at sentencing to: (a) abuse of**
 24 **trust enhancement; (b) drug treatment and**
 25 **psychological counseling; and (c) restitution**

26 ⁶ What appears on its face to be patently false is
 27 defendant's allegation that Peterson told defendant that he would
 28 not object because Peterson was scheduled to leave the next day
 for vacation. (Peterson Decl. ¶ 40).

(Claim #10)

Defendant claims that Peterson was ineffective by failing to object at sentencing to the imposition of the abuse of trust enhancement and conditions requiring drug treatment, psychological counseling, and monthly restitution payments of \$1,000. Peterson, however, did object to the restitution schedule and abuse of trust enhancement in the sentencing position paper he submitted and during the sentencing hearing. (Kin Decl. Ex. G at 3; Kin Decl. Ex. I at 5-6). Accordingly, defendant's ineffective counsel claim, which is based on the alleged failure of Peterson to so object, fails. In any event, even if Peterson had failed to object, there was no prejudice, as the record amply supported the Court's decision to impose the abuse of trust enhancement and restitution schedule over any objection. See Thornton, 511 F.3d at 1227 (affirming imposition of abuse of trust enhancement); United States v. Thornton, No. 03-50310, 2006 WL 932034 (9th Cir. Apr. 10, 2006) (rejecting defendant's challenge to restitution award).

Similarly, although Peterson did not object to the conditions requiring drug treatment and psychological counseling, the failure to do so resulted in no prejudice, as the Court's decision to impose these conditions was amply supported by evidence of defendant's long-term addiction to morphine and pain killers and a demonstrated narcissistic personality disorder. Indeed, with respect to the drug treatment and psychological counseling requirements, Peterson did not argue against them because he felt that the record supported their imposition by the Court and that they may be appropriate. (Peterson Decl. ¶ 41).

1 Thus, the decision not to object to the imposition of these well-
2 supported conditions fell well within the wide range of
3 reasonable representation. Strickland, 466 U.S. at 689.

4 **10. Failure to investigate and counter sentencing**
5 **enhancement for carrying a firearm (Claim #11)**

6 Defendant claims that Peterson failed to object to the
7 sentencing enhancement for carrying a weapon in connection with
8 the offense and failed to investigate defendant's claim that he
9 had a permit to carry such a weapon. Peterson's failure to so
10 object was not error, however, because defendant had specifically
11 agreed to that sentencing enhancement in the plea agreement, as
12 well as facts in support of that enhancement. (Kin Decl. Ex. E
13 at ¶ 18 & Attach. A at ¶ 5(g)(ii)). Moreover, even if Peterson's
14 failure to object were somehow error, no prejudice resulted,
15 because defendant admitted to federal agents upon his arrest that
16 he had carried his weapon without a permit, which was sufficient
17 to support the enhancement. (Kin Decl. Ex. C). Furthermore,
18 whether or not Peterson investigated the existence of a permit is
19 entirely irrelevant, because the imposition of the sentencing
20 enhancement for carrying a firearm in connection with the offense
21 is in no way affected by whether the firearm was lawfully
22 possessed. Cf. USSG § 2F1.1 (b)(7) (2000) ("If the offense
23 involved possession of a dangerous weapon (including a
24 firearm) in connection with the offense, increase by 2 levels.").
25 Accordingly, Peterson's failure to object to the firearm
26 enhancement or investigate the matter further did not constitute
27 ineffective assistance of counsel. Strickland, 466 U.S. at
28 687-88, 694.

11. Failure to argue against 16-level enhancement for
amount of loss (Claim #12)

Defendant claims that Peterson erred by failing to object to the Court's imposition of a 16-level increase for amount of loss at sentencing. Peterson did not do so, however, because defendant had stipulated to this enhancement in the plea agreement and agreed to facts that would support its application. (Peterson Decl. ¶ 43; Kin Decl. Ex. E at ¶ 18 & Attach. A at ¶ 8). On appeal, the Ninth Circuit held that defendant's agreement to the loss enhancement in the plea agreement was a complete waiver of the issue. Thornton, 511 F.3d at 1227. Accordingly, Peterson's actions in conformity with defendant's stipulations in the plea agreement can hardly be deemed to constitute ineffective representation. To the contrary, if Peterson had so objected, that action would have constituted a breach of the plea agreement and placed in jeopardy the substantial benefits defendant received under the agreement. (Kin Decl. Ex. E at ¶ 24) (breach provision). Furthermore, insofar as Peterson was free to address the amount of loss in connection with sentencing, Peterson did so by entreating the Court to impose a low-end sentence because the overwhelming bulk of the loss amount was made up of the intended loss for the \$25 million dollar check that defendant did not successfully cash, thus causing no loss to any victim.

Accordingly, Peterson properly refrained from objecting to the 16-level enhancement for loss and otherwise appropriately raised the amount of loss issue. Thus his performance in this regard did not fall below the wide range of reasonable

1 representation. Strickland, 466 U.S. at 688.

2 **12. Failure to assert claim that government unlawfully**
3 **informed third parties about search and arrest**
4 **warrants (Claim #13)**

5 Defendant claims that the government unlawfully
6 informed third parties when it would execute arrest and search
7 warrants for defendant and further claims that Peterson failed to
8 act on such information. It is not clear that defendant ever
9 raised this issue with Peterson. (Peterson Decl. ¶ 44). Even if
10 defendant had done so, Peterson, in the exercise of his judgment,
11 would not have raised it with the Court, as there was no evidence
12 in the record to support defendant's claim and, even if the
13 government had informed third parties, such actions would not
14 have been unlawful. (Peterson Decl. ¶ 44). Moreover, to the
15 extent informing third parties were a violation of law, there
16 would have been no remedy or advantage that might have been
17 obtained in the criminal case by raising the issue, as it would
18 not have been grounds for suppression of evidence or a basis for
19 dismissing charges. Accordingly, Peterson's representation in
20 this regard was not defective, and defendant suffered no
21 prejudice. Strickland, 466 U.S. at 687-88, 694.

22 **13. Failure to craft defense based on purportedly**
23 **exculpatory documents (Claim #14)**

24 Defendant claims that Peterson failed to obtain or use
25 certain purported exculpatory documents, namely, the Thornton
26 Foundation Bylaws and the contract with USC. Contrary to that
27 assertion, however, Peterson, in fact, reviewed such documents in
28 the course of reviewing the discovery provided by the government,

1 but he concluded that they were neither helpful nor exculpatory,
 2 and thus did not base any defense on these documents. (Peterson
 3 Decl. ¶ 45). In fact, as Peterson rightly concluded (Peterson
 4 Decl. ¶ 45), these documents merely prove the existence of the
 5 Thornton Kidney Foundation and its fundraising relationship with
 6 USC, which provided the mechanism by which defendant was able to
 7 perpetrate his fraud and steal money from USC and its donors.
 8 (Kin Decl. ¶ 3 & Ex. B). Because these materials would not
 9 provide any viable defense to the charges, Peterson's alleged
 10 failure to review or rely on them could not have risen to the
 11 level of a valid ineffective assistance of counsel claim.
 12 Strickland, 466 U.S. at 687-88, 694.

13 **14. Failure to make downward departure motion based on**
 14 **defendant's medical condition (Claim #15)**

15 Defendant claims that Peterson failed to obtain medical
 16 records or argue for a downward departure based on defendant's
 17 medical condition. Peterson, however, was precluded from arguing
 18 for any departures by the plea agreement defendant signed and
 19 agreed to. (Peterson Decl. ¶ 46; Kin Decl. Ex. E at ¶¶ 18-19).

20 **C. Petitioner's Reply**

21 The Court should hold an evidentiary hearing and
 22 appoint counsel to represent defendant. The statements⁷ of Diana
 23 M. Thornton and Patricia R. Thornton, defendant's wife and mother
 24 respectively, along with defendant's father's 2003 letter
 25 (Exhibits A, B, and C) support defendant's contentions regarding
 26

27 ⁷ Defendant refers to these as "declarations," but they are
 28 not signed under penalty of perjury and thus do not qualify as
 declarations. See 28 U.S.C. § 1746.

1 his innocence and the failures of defense counsel. Claim by
2 claim, with the exception of claims 2, 3, and 13, that defendant
3 did not address in his reply, defendant sets forth his responses
4 as follows:

5 **1. Failure to interview witnesses (Claim #1)**

6 Defendant gave a list of names to Peterson and
7 Investigator Oates with the intention of preparing for trial.
8 Out of seven names provided, Oates only spoke with one.
9 Defendant requested his wife, mother, father, Bill Ott, and Steve
10 Hurd be interviewed because they would all demonstrate his
11 innocence. For example, Hurd would testify to defendant's
12 application and receipt for a concealed weapon permit.

13 **2. Failure to prepare for trial and insistence that**
14 **defendant plead guilty (Claims #4 & #5)**

15 Defendant did not communicate to Peterson, Oates, or
16 any other court officer that he wanted to accept a plea deal.
17 Peterson inflates his record of communications with defendant,
18 and, if the defendant had been aware it was his decision to
19 accept or reject the plea, he would have insisted on trial.

20 **3. Instructing defendant to lie about defendant's**
21 **innocence at the guilty plea hearing (Claim #6)**

22 The admissions defendant made in the plea agreement and
23 in the plea colloquy were based on Peterson's instructions and
24 warnings that defendant would lose the deal and receive twenty
25 six years in prison.

26 **4. Failure to forward letters at sentencing (Claim**
27 **#7)**

28 Defendant adds no new facts but states his disagreement

1 with the government's position.

2 **5. Failure to assert entrapment defense (Claim #8)**

3 If Peterson had interviewed the people defendant
4 suggested, Peterson would have discovered that the government was
5 the reason defendant was working with the Federal Republic of
6 Nigeria.

7 **6. Failure to object to presence of victims at**
8 **sentencing hearing (Claim #9)**

9 There were five victims in the courtroom at sentencing,
10 not thirty-five. Nonetheless, Peterson failed to object to their
11 presence.

12 **7. Failure to object at sentencing to: (a) abuse of**
13 **trust enhancement; (b) drug treatment and**
14 **psychological counseling; and (c) restitution**
15 **(Claim #10)**

16 Defendant renews his claims of error and disagrees with
17 the government's position.

18 **8. Failure to investigate and counter sentencing**
19 **enhancement for carrying a firearm (Claim #11)**

20 Defendant reiterates his claims and notes that the
21 firearm was never used to manipulate others; nor was it used in
22 connection with the alleged crimes. Although defendant agreed to
23 it in the plea agreement, he calls into question the legitimacy
24 of that document.

25 //

26 **9. Failure to argue against 16-level enhancement for**
27 **amount of loss (Claim #12)**

28 Defendant reiterates that counsel should have objected

1 to the 16-level enhancement.

2 **10. Failure to craft defense based on purportedly**
 3 **exculpatory documents (Claim #14)**

4 Defendant renews his claim that Peterson failed to
 5 locate the Foundation's bylaws and that the bylaws would have
 6 exonerated him from the charges in the indictment related to his
 7 activity at the Foundation.

8 **11. Failure to make downward departure motion based on**
 9 **defendant's medical condition (Claim #15)**

10 Defendant's medical records should have been presented
 11 at sentencing in order to argue for a downward departure because
 12 they would have demonstrated that defendant's morphine use is
 13 medically legitimate.

14 **IV.**

15 **DISCUSSION**

16 **A. Legal Standard**

17 A district court may deny a § 2255 motion without
 18 holding an evidentiary hearing when the record clearly
 19 establishes that the petitioner is not entitled to relief or when
 20 the motion presents "no more than allegations unsupported by the
 21 facts or refuted by the record." United States v. Quan, 789 F.2d
 22 711, 715 (9th Cir. 1986). "In addition, judges may use their own
 23 notes and recollections of the plea hearing and sentencing
 24 process to supplement the record." Shah v. United States, 878
 25 F.2d 1156, 1159 (9th Cir. 1989). "Additionally, where a
 26 petitioner's allegations are vague and conclusory, the Court need
 27 not grant an evidentiary hearing. Id.

28 Here, defendant asserts that his contradictions to

1 Peterson's version of the facts warrant an evidentiary hearing.
2 Defendant's contentions, however, are directly contradicted by
3 the record and sometimes his own statements. For example,
4 defendant claims that he thought it was his counsel's decision to
5 accept the plea. (Reply at 4.) But at his change of plea
6 hearing, defendant was placed under oath and the Court asked,
7 "And based on your education, your experience, and what you know
8 of your case, are you satisfied that going forward with this plea
9 agreement is in your best interest?" defendant responded, "Yes, I
10 do." (Gov't Opp. Ex. F at 28.) In his claim nine of his
11 petition, defendant argues that his counsel was ineffective for
12 failing to object to the thirty-five victims present at his
13 sentencing. But, in his reply, he indicates that there were five
14 victims present (Reply at 9.) Further, defendant's disavowal
15 that he represented he was a federal agent is contradicted by
16 defendant's petition in claim eight, wherein he argues that his
17 "relationship with the United States Government is the sole
18 reason" he was interacting with the Nigerian government. (Reply
19 at 8.) As noted earlier, the purported declarations that
20 defendant's mother and sister submit are not under penalty of
21 perjury and therefore not evidence to support petitioner's
22 claims.

23 Given that defendant's facts are contradicted by both
24 the record and himself, the Court finds that the instant matter
25 is appropriate for decision without holding an evidentiary
26 hearing. Based on the arguments and authorities in the parties'
27 papers, and the Court's independent research, the Court denies
28 petitioner's § 2255 motion.

1 **B. Analysis**

2 To demonstrate ineffective assistance of counsel, the
3 petitioner must first show that counsel's performance was
4 deficient. Richter v. Hickman, - F.3d -, No. 06-15614, 2009 WL
5 2425390, at *6 (9th Cir. Aug. 10, 2009) (citing Strickland, 466
6 U.S. at 687). "To be 'deficient,' counsel's performance at trial
7 must be objectively unreasonable - it must be 'outside the wide
8 range of professionally competent assistance.'" Id. (quoting
9 Strickland, 466 U.S. at 688, 690). Counsel is afforded a
10 presumption of adequacy and the Court should be highly
11 deferential in judging counsel's performance. Id. The
12 petitioner must then show that counsel's deficient performance
13 prejudiced his defense such that but-for counsel's failures,
14 there is a reasonable probability that the outcome of the
15 proceeding would have been different. Id. "A reasonable
16 probability is a probability sufficient to undermine confidence
17 in the outcome." Id. at *13 (internal quotations omitted).

18 **1. Claim One**

19 Defendant claims that his counsel was ineffective for
20 failing to interview witnesses who would demonstrate his
21 innocence. The witnesses that defendant provided to Peterson,
22 however, are individuals with whom Peterson or the investigator
23 spoke, and there is no evidence that they would demonstrate
24 petitioner's innocence.

25 "Strategic choices made after thorough investigation of
26 law and facts relevant to plausible options are virtually
27 unchallengeable." Knowles v. Mirzayance, - U.S. -, 129 S. Ct.
28 1411, 1420, 173 L. Ed. 2d 251 (2009) (citing Strickland, 466 U.S.

1 at 690). Here, Peterson directed the investigator to interview a
2 number of witnesses, including those whom defendant now claims he
3 instructed be interviewed: Steven Hurd, B. Ott, defendant's
4 wife, and defendant's mother. The investigator also interviewed:
5 (1) Dr. Kalu, (2) Dr. Sansu; (3) Dr. Hapleman; and (4) M. Silk.
6 (Peterson Decl. ¶ 33.) Defendant's claim is contradicted by the
7 record: his counsel conducted a thorough investigation of those
8 that defendant requested and others. Petitioner adduces no
9 evidence from these witnesses showing their testimony would
10 exonerate him from any of the charges. The state of the record
11 demonstrates that counsel conducted a "thorough investigation,"
12 and defendant is unable to demonstrate that his performance was
13 unreasonable.

14 **2. Claims Two and Three**

15 Defendant claims that the key prosecution witness gave
16 federal agents access to defendant's documents and that the
17 agents lacked a search warrant when they reviewed the documents.
18 While it is unclear whether defendant actually informed Peterson
19 of this, it is irrelevant. As the government notes, a search
20 warrant is not required when a third party provides documents to
21 federal agents because that activity is not, by definition, a
22 search. United States v. Snowadzki, 723 F.2d 1427, 1430 (9th
23 Cir. 1984). Consequently, any failure to inquire into this issue
24 did not constitute ineffective assistance because the provision
25 of documents has not been shown to be other than legitimate.

26 **3. Claim Four**

27 Defendant claims that his counsel forced him to accept
28 the plea agreement because, despite defendant being innocent,

1 Peterson was unwilling to go to trial. This claim is
2 contradicted by Peterson's work log and, more importantly, by
3 defendant's own statements.

4 The Court is not required to give weight to these
5 "patently frivolous" claims. See Shah, 878 F.2d at 1158.

6 Peterson's work log demonstrates that he spent a significant
7 amount of time between July 15, 2002, and March 7, 2003,
8 investigating and preparing for trial prior to the plea deal
9 offered by the government. (Peterson Decl. Ex. A.)

10 Additionally, defendant's handwritten confession contradicts his
11 claim of innocence: (1) "I opened unauthorized accounts . . . in
12 the name of the USC/Thornton Kidney Research Foundation"; (2) "I
13 used these funds to pay . . . as a person with personal debts";
14 (3) "I admit that the security agents I hired were not a
15 'protective detail' or a federal agents [sic]"; (4) "I never
16 officially worked with the State Department or as a federal
17 employee of the state department." (Kin Decl. Ex. C.)

18 Accordingly, Peterson was not ineffective for failing to advocate
19 defendant's innocence at a trial when defendant knowingly
20 admitted his guilt.

21 **4. Claim Five**

22 Defendant claims Peterson was ineffective because
23 Peterson failed to communicate to the government his willingness
24 to cooperate in order to reduce his sentence.

25 This claim fails because Peterson, after conducting an
26 investigation, determined that defendant's offer of cooperation
27 would not provide substantive help to the government. Because
28 Peterson had conducted a thorough investigation, as discussed

1 above, he determined defendant's proffer of assistance would be
2 ineffectual and, thus, did not communicate it to the government.
3 As in Knowles, this was a strategic decision made after
4 investigation and, as such, does not constitute defective
5 representation.

6 Additionally, in his handwritten confession, defendant
7 wrote, referring to his Nigerian contacts, "I would be pleased to
8 turn over the names, records, etc. to any govt. agency whom would
9 need this assistance." (Kin Decl. Ex. C.) Even if these
10 allegations constituted grounds for ineffective assistance, which
11 they are not, this claim would fail for lack of prejudice because
12 defendant communicated the offer of assistance himself.

13 **5. Claim Six**

14 Defendant's claim that his counsel instructed him to
15 lie about his innocence at his plea hearing is contradicted by
16 the record, including his own statements.

17 "A defendant who pleads guilty upon the advice of
18 counsel may only attack the voluntary and intelligent character
19 of the guilty plea by showing that the advice he received from
20 counsel was not within the range of competence demanded of
21 attorneys in criminal cases." Shah, 878 F.2d at 1158 (quotations
22 omitted). As discussed in claim four, defendant confessed to his
23 crimes and testified at his plea hearing that his plea was in his
24 best interest. Defendant's statements in his habeas petition
25 that the only reason he pleaded guilty was because of his
26 counsel's instruction to lie are "patently frivolous and totally
27 incredible." See id. Counsel explained that he carefully
28 advised defendant of the terms of the plea agreement and did not

1 instruct him to lie. Additionally, given that the government's
2 letter indicated that defendant could face a maximum sentence of
3 over twenty years, and that defendant had confessed, encouraging
4 him to accept the plea bargain was not "outside the range of
5 competence."

6 **6. Claim Seven**

7 Defendant claims his counsel was defective for failing
8 to forward letters from his family members in preparation for his
9 sentencing. As the government notes, the Court at sentencing
10 stated that it had reviewed all of the letters submitted by
11 defendant.

12 That there may have been other letters available from
13 defendant's immediate relatives, in addition to those of his
14 cousin, grade school teacher, church friends, and extended
15 relatives would have had no effect on his sentencing. See Shah,
16 878 F.2d at 1158 (providing that the Court can use its own
17 recollection to supplement the record). Further, the information
18 attached to defendant's reply, purported to be those not
19 submitted, do not demonstrate innocence and do not contradict the
20 record. For example, defendant's wife discusses being present
21 when defendant attempted to cash the \$25 million check and
22 states, "I asked him when we could begin using this money.
23 [Defendant] stated that the bank needed to confirm that the check
24 was legitimate first." (Reply Ex. A, Declaration of Patricia
25 Thornton ("P. Thornton Decl.") at 2.) Defendant's father's
26 letter provides, "[Defendant], our son, we feel was caught up in
27 a scam which he totally believed and trusted in what the Nigerian
28 scam artists had told him and this, of course, was mixed with his

1 | greed." (Reply Ex. C.) These statements show that defendant did
2 | try to cash the \$25 million check and that he was involved in a
3 | scheme to defraud that was fostered by his greed. If Peterson
4 | did possess defendant's father's letter and decided not to submit
5 | it, that decision would have been in defendant's best interest,
6 | considering its content. Regardless, no prejudice is shown
7 | because additional letters would not have affected the Court's
8 | sentencing.

9 | **7. Claim Eight**

10 | Defendant claims his counsel was ineffective for
11 | failing to assert an entrapment defense. Defendant's reply
12 | explains that, contrary to the government's argument, there was
13 | government involvement because his "relationship with the United
14 | States Government is the sole reason" he was interacting with the
15 | Nigerian government. (Reply at 8.)

16 | Here, defendant's contradiction and attempt to claim
17 | that there was government involvement lacks credibility and
18 | undermines his claims of innocence. First, defendant provides no
19 | factual support for his claim that the government was involved.
20 | Second, his assertion that the government was involved reinforces
21 | the charge that defendant held himself out as a government agent.
22 | The Court need not give credence to defendant's argument. Quan,
23 | 789 F.2d at 715. Without government involvement, entrapment
24 | cannot serve as a defense. Glassel, 488 F.2d at 146 n.2.
25 | Counsel's performance cannot be found deficient for failing to
26 | raise a defense that could not apply.

27 | **8. Claim Nine**

28 | Defendant argues his counsel was defective for failing

1 to object to the presence of victims of his scheme at his
2 sentencing hearing. Victims are permitted to attend sentencing
3 hearings and possess the right to be "reasonably heard" at those
4 proceedings. Kenna, 435 F.3d at 1015. Any objection made to the
5 presence of defendant's victims would have been contrary to law.
6 As discussed above, counsel cannot be found ineffective for
7 failing to mount a legally unavailable argument.

8 **9. Claim Ten**

9 Defendant claims his counsel was ineffective for
10 failing to object at sentencing to the enhancement for abuse of
11 trust and conditions requiring drug treatment, counseling, and
12 restitution. The record demonstrates, however, that Peterson did
13 object to the abuse of trust enhancement and the restitution
14 schedule both in the sentencing papers and at the hearing.

15 Regarding the drug treatment and counseling, Peterson
16 explains that he made the decision not to object on the grounds
17 that the record supported it and that it was likely appropriate.
18 Whether defendant takes morphine based on an addiction or for
19 pain control, it is uncontradicted he was taking it regularly,
20 and his father's letter states that, "[h]e has been on morphine
21 for years to keep the pain subsided. This may be one of his
22 psychological problems he has acquired by taking the medication."
23 (Reply Ex. C.) Thus, information defendant supplied to the Court
24 supports the reasonableness of imposing drug treatment and
25 counseling. As such, counsel's failure to object did not
26 constitute ineffective assistance of counsel.

27 **10. Claim Eleven**

28 Defendant claims his counsel was ineffective for

1 failing to present evidence that he had a permit for the weapon
2 he carried in order to counter the sentencing enhancement for
3 carrying a gun in commission of a crime. In his plea agreement,
4 defendant agreed to a two-point enhancement for possession of a
5 dangerous weapon. (Lin Decl. Ex E at 7.) The plea agreement
6 also provides that "Defendant and the USAO agree not to seek,
7 argue, or suggest that any specific offense characteristics,
8 adjustments or departures other than those stipulated [above]
9 should be imposed." (Id.) If defendant's counsel had objected
10 to the enhancement at sentencing it would have constituted a
11 breach of the plea agreement. Additionally, as the government
12 notes, whether defendant possessed a permit for the concealed
13 weapon is irrelevant for the purposes of the enhancement.

14 Lastly, defendant raises for the first time in his
15 reply the contention that he did not use the weapon in the
16 commission of the crimes. Use, however, is not a legal
17 requirement. See United States v. Riley, 335 F.3d 919, 930 (9th
18 Cir. 2003) (affirming enhancement where gun was affiliated with
19 other evidence used in connection with the crime and where
20 defendant claimed, like here, that he carried the gun for
21 protection). Thus, no prejudice can be shown from Peterson's
22 failure to object on this ground.

23 **11. Claim Twelve**

24 Defendant claims his counsel was ineffective because he
25 did not object to the amount of loss at sentencing. As discussed
26 above, a challenge to this would have constituted a breach of the
27 plea agreement. On appeal, the Ninth Circuit held that
28 defendant's agreement to the loss amount in the plea constituted

1 a waiver of the issue. As such, defendant cannot re-litigate
2 this issue because prior decisions in the case constitute law of
3 the case and should be respected. United States v. Hayes, 231
4 F.3d 1132, 1139 (9th Cir. 2000). Moreover, counsel cannot be
5 found ineffective for keeping a beneficial plea agreement intact.

6 **12. Claim Thirteen**

7 Defendant claims his counsel was ineffective for
8 failing to act on the information that the government informed
9 third parties when it would arrest defendant. First, it is
10 unclear defendant told Peterson about this. Second, it does not
11 appear to be an actionable complaint. See Rouse v. United States
12 Dep't of State, 567 F.3d 408, 413-414 (9th Cir. 2009) (discussing
13 the Privacy Act, 5 U.S.C. § 552a). Lastly, petitioner fails to
14 show how raising this argument would have favorably impacted
15 defendant's case. Consequently, counsel's performance was not
16 defective for failing to raise this issue.

17 **13. Claim Fourteen**

18 Defendant argues that his counsel was ineffective for
19 failing to introduce to the Court the bylaws of his Foundation,
20 which he claims would be exculpatory. Peterson reviewed the
21 bylaws and did not provide them to the Court because, in his
22 judgment, they were not exculpatory. This assessment is correct,
23 as they merely establish the existence of defendant's charitable
24 organization. (Kin Decl. Ex. B.) Furthermore, defendant's
25 written confession establishes that he opened unauthorized
26 accounts and otherwise committed the acts that formed the basis
27 of the charges against him. As such, the evidence conclusively
28 shows that counsel could not have been defective for failing to

1 bring the bylaws to the Court's attention.

2 **14. Claim Fifteen**

3 Defendant argues that his counsel was ineffective for
4 failing to obtain medical records and argue for a downward
5 departure based on his medical condition. As discussed above,
6 arguing for a sentence that departed from the plea agreement
7 would have violated the agreement and caused defendant more harm
8 than good. Additionally, the Court had evidence of defendant's
9 medical condition from the letters submitted on his behalf. For
10 example, his wife's letter provides "On our first date, he made
11 it clear how serious his illness, angiodysplasia, was" and
12 "Despite the pain which has plagued him for much of his life,
13 [Defendant] manages to make each day count. . . ." (Kin Decl.
14 Ex. G.) Another friend of defendant wrote "He had extreme health
15 problems which necessitated many surgeries and other
16 interventions by the health professionals." (Id.) Another
17 letter provides "I know he has a very serious physical condition
18 with only one kidney and is always in a lot of pain." (Id.)
19 Accordingly, the Court was aware of his condition and could have,
20 but for the reasons articulated in its tentative ruling, did not
21 reduce defendant's sentence on those grounds. Counsel's
22 representation was not defective and any such argument would have
23 been without effect.

24 //

25 //

26 **V.**

27 **CONCLUSION**

28 Accordingly and for the foregoing reasons, the Court

1 denies petitioner's § 2255 motion to vacate, set aside or correct
2 sentence.

3 In anticipation of petitioner's request, the Court
4 denies issuance of a certificate of appealability because
5 petitioner has not "made a substantial showing of the denial of a
6 constitutional right." See 28 U.S.C. § 2253(c)(2), (c)(3).

7 IT IS SO ORDERED.

8 IT IS FURTHER ORDERED that the Clerk shall serve a copy
9 of this Order on the government and defendant at his last known
10 address.

11 DATED: September 8, 2009.

12 ALICEMARIE H. STOTLER

13
14

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE